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From Platitudes to the Passage of the Hear Act: How Procedural Obstacles in U.S. Courts Have Prevented the Restitution of Nazi-Expropriated Art and Congress's Efforts to Provide a Resolution

Jillian E. Meaney

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*Jillian E. Meaney**

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"Greed, cruelty, self-interest, domination, will always be with us. It's an easy option. Justice is so much more difficult, so much more complex. But we all dream of justice."—Dame Helen Mirren during her testimony at the Senate subcommittee hearing on the Holocaust Expropriated Art Recovery Act of 2016.

INTRODUCTION

Nazi Germany systematically attempted to exterminate Jews and Jewish culture[1] and to make itself the world's political and cultural epicenter by, among other things, amassing for itself the world's greatest art collection.[2] In true Napoleonic form, Nazis relentlessly acquired art from conquered territories and destroyed it, hid it for safe-keeping, or forwarded it to Germany.[3] With particular aggression, Nazis looted and seized Jewish-owned art[4] and led an "Aryanization" campaign which included forcing Jews to sell their art to Nazis for far less than the art was

1. In Austria alone, Nazis murdered 65,000 Jews and approximately 130,000 Jews fled from Austria permanently. ANNE-MARIE O'CONNOR, THE LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAV KLIMT'S MASTERPIECE, PORTRAIT OF ADELE BLOCH-BAUER 213 (2012).

2. LYNN H. NICHOLAS, THE RAPE OF EUROPA 41–49 (1994).

3. *See generally id.* (describing Nazi theft of artistic and historical property during World War II).

4. *Id.* at 38.

worth.[5] Since World War II, governments and international bodies have made efforts to return Nazi-expropriated art to its rightful owners.[6] However, the path to recover the art is often met with resistance, not only from those who currently possess the art, but also from U.S. procedural laws that often prevent the rightful owner from regaining possession of the art.

This Note describes the development of art restitution jurisprudence in the United States regarding Nazi-expropriated art in particular,[7] and the procedural obstacles that have prevented claimants from recovering their art. Traditionally, the two primary procedural obstacles were (1) acquiring jurisdiction over foreign sovereigns that had the Nazi-expropriated art in their possession, and (2) statutes of limitations under state law. This Note discusses the overcoming of the jurisdictional obstacle and the recent passage of the Holocaust Expropriated Art Recovery Act of 2016[8] (HEAR Act) which curtails the statutes-of-limitations obstacle. The HEAR Act created a federal statute of limitations that preempts statutes of limitations under state law. The objective of the HEAR Act's statute of limitations is to allow restitution claims regarding Nazi-expropriated art to reach a resolution on the merits of the claims. However, the HEAR Act is modest in scope and should be amended to better fulfill its objective.

PART I - BACKGROUND: INTERNATIONAL STANDARDS & EXISTING U.S. POLICIES REGARDING ART RESTITUTION

Shortly after World War II, the international community, including the United States, addressed the need for the protection of art in future armed conflicts. Their objectives included preventing the expropriation of art by an occupying nation and encouraging the return of expropriated art to its rightful owner. The international community wanted to prevent a mass-expropriation event, like the one carried out by the Nazis during World War II, from happening again.

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5. *Id.* at 30–31.

6. *See id.* at 407–44. *See generally* Jeffrey Davis, *Choosing Among Innocents: Should Donations to Charities be Protected from Avoidance as Fraudulent Transfers?*, 23 U. FLA. J.L. & PUB. POL'Y 407, 411–13 (2012).

7. For the purposes of this Note, "Nazi-expropriated art" refers to art that was expropriated by the Nazis, either by looting, theft, or forced sale.

8. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524.

A. *The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols*

One of the most significant international agreements dedicated to developing protocols to ensure the protection of cultural property during wartime was established in 1954—the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols (1954 Hague Protocol).[9] The 1954 Hague Protocol's definition of "cultural property" includes works of art, architecture, monuments, and museums.[10] The purpose of the 1954 Hague Protocol was to establish legal standards that require countries to safeguard their own cultural property during armed conflict or occupation.[11] It also requires any invading country that is a party to the 1954 Hague Protocol to refrain from stealing, pillaging, vandalizing, requisitioning, or misappropriating any cultural property situated in the invaded or occupied territory.[12] The 1954 Hague Protocol forbids the destruction or expropriation of cultural property during any armed conflict or period of occupation.[13] These requirements to safeguard and respect other nations' cultural property can only be waived if "military necessity imperatively requires such a waiver."[14] Furthermore, the 1954 Hague Protocol mandates that any cultural property removed during an armed conflict or occupation be returned after the armed conflict or occupation has ceased.[15]

The United States signed the 1954 Hague Protocol in 1954.[16] However, the United States did not ratify the 1954 Hague Protocol until 2009, and in doing so, the United States made its ratification subject to four qualifications, or "understandings," and subject to one declaration.[17]

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9. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 295 (7th Cir. 1990).

10. Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols art. 1(a), May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention], http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#SIGNATURE.

11. *Id.* art. 3.

12. *Id.* art. 4.

13. *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 296.

14. Hague Convention, *supra* note 10, art. 4, ¶ 2.

15. *Id.* art. 18.

16. Hague Convention, *supra* note 10.

17. S. EXEC. DOC. NO. 110-26, at 8 (2008). The First Understanding stated that the level of protection given to certain cultural property is consistent with "existing customary international law." *Id.* The Second Understanding stated that a military person's conduct regarding cultural property is to be judged based on the level of information that was available to the military person at the time the military person took action. *Id.* The Third Understanding stated that the 1954 Hague Protocol only applies to conventional weapons and does not affect international law regarding other types of weapons (*e.g.*, nuclear weapons). *Id.* at 9. The Fourth Understanding states that the

Notably, the declaration stated that the 1954 Hague Protocol did not confer any right that would be enforceable in U.S. federal and state courts (hereinafter referred to collectively as "U.S. courts").[18]

In 1999, the Hague Convention completed a Second Protocol which addressed weaknesses in the 1954 Hague Protocol.[19] The Second Protocol narrowed the circumstances in which a nation may claim a waiver on the basis of military necessity to circumstances where "cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective."[20] The Second Protocol also required an attacking force to avoid or minimize any incidental damage to cultural property and provided enhanced protection to certain types of cultural property.[21] To date, the United States has not signed the Second Protocol.[22]

B. *The Washington Conference Principles on Nazi-Confiscated Art of 1998*

One of the most prominent international conferences to address restitution for Nazi-expropriated art was the Washington Conference on Holocaust-Era Assets that was held in Washington, D.C. in 1998.[23] One of the accomplishments of the Washington Conference was the Washington Conference Principles on Nazi-Confiscated Art (Principles).[24] The Principles urged nations to facilitate the identification and return of all Nazi-expropriated art and to identify the pre-War owners of the art, stating that steps should be taken "expeditiously to achieve a

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1954 Hague Protocol requires parties to the treaty to protect cultural property within their own borders, which means that the party "primarily responsible" for protecting the cultural property must properly identify the cultural property and ensure that it is not used for an unlawful purpose. *Id.*

18. *Id.* at 9. The Declaration also stated that the 1954 Hague Protocol was self-executing, *i.e.*, that the 1954 Hague Protocol "operates of its own force as domestically enforceable federal law," so, ratification of the 1954 Hague Protocol did not require any implementing legislation. *Id.*

19. *See* Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999 (entered into force Mar. 9, 2004), http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

20. *Id.* art. 6(a).

21. *Id.* art. 7.

22. *Id.*

23. *See* Washington Conference Principles on Nazi-Confiscated Art, Washington Conference on Holocaust Era Assets (Dec. 3, 1998), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf.

24. *Id.*

just and fair solution."[25] The Principles encouraged nations to make efforts to publicize the discovery of Nazi-expropriated art and to establish a central registry containing information about the discovered art.[26] Furthermore, the Principles encouraged nations to develop laws and procedures in their own legal tradition to facilitate the resolution of ownership issues surrounding Nazi-expropriated art.[27] Forty-four nations, including the United States, agreed to follow the guidelines outlined in the Principles.[28] However, the guidelines are non-binding and do not provide claimants with much, if any, support in their efforts to seek art restitution in U.S. courts.[29]

C. *Holocaust Victims Redress Act of 1998*

In 1998, the Holocaust Victims Redress Act (Redress Act) became law in the United States.[30] Regarding works of art, the Redress Act noted that, if the art was expropriated during the Nazi's rule and if there was "reasonable proof" regarding the identity of the art's rightful owner, then "all governments should undertake good faith efforts to facilitate the return of . . . [the] art, to the rightful owners."[31] The Redress Act authorized the President to appropriate funds to charitable organizations that assist survivors of the Holocaust.[32] Furthermore, it authorized the President to appropriate funds for "archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust . . . ."[33] However, like the conventions and guidelines previously adopted or ratified by the United States, the Redress Act did not create a private right of action in U.S. courts for victims of the Holocaust or their heirs and, according to the Ninth Circuit Court of Appeals, the Redress Act was not intended to "supersede traditional state-law remedies."[34] Rather, it was the legislature's intent that the Redress Act provide for easier access of information, not easier access to courts.[35] In *Orkin v. Taylor*, the claimant sought to recover

25. *Id.*
26. *Id.*
27. *Id.*
28. Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZA J. CONFLICT RESOL. 643, 651, 651 n.55 (2010).
29. *See id.* at 651–52.
30. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).
31. *Id.*
32. *Id.*
33. *Id.*
34. Orkin v. Taylor, 487 F.3d 734, 736, 740 (9th Cir. 2007).
35. *Id.* at 740 ("[T]he general purpose of the statutory scheme was to fund research efforts

Nazi-expropriated art, which had later been purchased by actress Elizabeth Taylor; however, the Ninth Circuit held that, because the Redress Act did not create a private right of action, the claimants were barred from recovering the art by the statute of limitations under their state's law.[36] The claimant argued that the Redress Act's "allocation of funds for provenance research . . . without also creating any federal cause of action . . . 'taunt[ed] Holocaust victims by providing them with information to help them locate Nazi-confiscated assets, while denying them a judicial remedy to reclaim their property if they can find it.'"[37]

D. *Terezin Declaration*

In 2009, the Czech Republic, among others, held the Prague Holocaust Era Assets Conference (Prague Conference).[38] Forty-six nations, including the United States, attended the conference.[39] The purpose of the conference was to discuss new and improved ways to conduct provenance research and to determine whether progress had been made in the area of art restitution since the 1998 Washington Conference on Holocaust-Era Assets.[40] The Prague Conference concluded with the issuance of the Terezin Declaration on June 30, 2009.[41] The Declaration urged nations to "support intensified systematic provenance research," to facilitate efficient restitution of Nazi-expropriated art within their nation's own legal framework, and to ensure that art restitution claims "are resolved expeditiously and based on the facts and merits of the claims."[42] The Terezin Declaration took the position that art restitution claims should be decided on the merits, and not based on "procedural technicalities," such as statutes of limitations.[43] However, the Terezin Declaration is a non-binding agreement which neither created a private

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and to declassify records, while simultaneously encouraging foreign governments, as well as public and private institutions, to do likewise. In other words, the motivating concern was *not* access to courts; it was access to information.").

36. *Id.* at 736.

37. Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust*, 88 OR. L. REV. 37, 61 (2009).

38. Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009) [hereinafter Terezin Declaration], http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf.

39. *Id.*; Dunbar v. Seger-Thomschitz, 615 F.3d 574, 577 n.1 (5th Cir. 2010).

40. Terezin Declaration, *supra* note 38.

41. *Id.*

42. *Id.*

43. Katharine N. Skinner, Note, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. 673, 682 (2013).

right to action in U.S. courts nor revised any procedural rules applied by U.S. courts.[44]

PART II – PROCEDURAL OBSTACLES IN U.S. ART RESTITUTION ACTIONS

The United States and many other nations support art restitution of Nazi-expropriated art by encouraging enhanced provenance research and centralized registries, and by agreeing that Nazi-expropriated art should be returned to its rightful owner.[45] However, these displays of support and encouragement are of limited use to claimants who are pursuing art restitution claims in U.S. courts.[46] The adopted conventions and laws neither provide the art-restitution claimant with an enforceable right nor do they enable the claimant to break through the procedural obstacles that prevent many claimants from ultimately recovering their Nazi-expropriated art from its current possessor.[47] Historically, a major procedural obstacle was obtaining jurisdiction over foreign sovereigns who had possession of the Nazi-expropriated art and who were not willing to return the art to its rightful owner. Until the recent passage of the HEAR Act, another major procedural obstacle was the heavy bar that statutes of limitations under state law often impose on actions to recover property that was stolen many decades ago.

A. *The Development of Foreign Sovereign Immunity Jurisprudence*

In the United States, art restitution claims involve the establishment of jurisdiction over foreign sovereigns that currently possess the Nazi-expropriated art. Many works of art that were expropriated by the Nazis have found their way to museums in the U.S. and to state-owned museums throughout Europe.[48] The ability of U.S. courts to acquire

44. Terezin Declaration, *supra* note 38; *see* Dunbar v. Seger-Thomschitz, 615 F.3d 574, 577 n.1, 578–79 (5th Cir. 2010).

45. *See supra* Part I.

46. *See* Mullery, *supra* note 28, at 651–52 ("Despite the United States's past zealous displays of support for the restitution of Nazi-looted art and the resolution of looted art claims, the government's efforts since the Washington Conference have remained limited to mere encouragement and displays of support, with progress only occurring in the realm of research and registry. Adherence and endeavors to fulfill the Washington Principles have been limited to those principles calling for the identification and the archiving of Nazi-looted art, as well as for the facilitation of access to this archived information for claimants. Specifically, progress has been limited to procedures that only comprise the beginning of the restitution process, namely research and identification.").

47. *See supra* Part I.

48. Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed*

jurisdiction over a foreign sovereign-owned museum was imperative to ultimately recovering the Nazi-expropriated art. In 2004, the U.S. Supreme Court addressed whether a foreign sovereign is immune from suit in U.S. courts by analyzing whether the Foreign Sovereign Immunity Act of 1976 (FSIA) applied retroactively to claims to recover art that was expropriated during World War II.[49] This Part discusses the development of foreign sovereign immunity jurisprudence and the principles that relate to the retroactive application of the FSIA.

1. Schooner and Pre-FSIA Foreign Sovereign Immunity Jurisprudence

American foreign sovereign immunity jurisprudence originated in *Schooner Exchange v. McFaddon*.[50] *Schooner Exchange* gave "virtually absolute immunity to foreign sovereigns."[51] Following *Schooner Exchange*, U.S. courts customarily declined to exercise jurisdiction over foreign sovereigns if a political branch asked it to do so.[52] U.S. courts deferred to the political branches and gave immunity to foreign sovereigns as a matter of "grace and comity," but not because they were constitutionally or otherwise required to grant the immunity.[53] In 1952, the U.S. State Department adopted the "restrictive theory" of foreign sovereign immunity which did not affect the court's deference to the political branches.[54] However, the "restrictive theory" policy created unclear standards that were not "uniformly applied."[55] In response, Congress enacted the FSIA.[56]

2. Foreign Sovereign Immunity Act of 1976

The FSIA codified the "restrictive theory" of foreign sovereign immunity and transferred to the judicial branch the decision-making authority to grant or withhold foreign sovereign immunity.[57] The FSIA is

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Solution to Disputes Over Title, 31 N.Y.U. J. INT'L L. & POL. 15, 15 (1998); Christa Roodt, *State Courts or ADR in Nazi-Era Art Disputes: A Choice "More Apparent than Real"?*, 14 CARDOZO J. CONFLICT RESOL. 421, 422 (2013).

49. *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004).

50. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *Altmann*, 541 U.S. at 688.

51. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

52. *Altmann*, 541 U.S. at 689.

53. *Id.* at 688–89.

54. *Id.* at 689–90 ("According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts *(jure imperii)* of a state, but not with respect to private acts (*jure gestionis*) . . . .").

55. *Id.* at 690–91.

56. *Id.* at 691.

57. *Id.*

the only way that U.S. courts may acquire jurisdiction over a foreign sovereign.[58] The FSIA includes a general grant of immunity[59] and exceptions.[60] The FSIA's expropriation exception indicates that a foreign sovereign will not be immune from the jurisdiction of U.S. courts if the cause of action involves property that was taken in violation of international law.[61] The expropriation exception also requires that the expropriated property be owned or operated by the foreign sovereign (or its instrumentality) and that it be engaged in commercial activity in the United States.[62] At the outset of an action against a foreign sovereign or its instrumentality, the court must decide whether one of the FSIA's exceptions applies.[63] Only if one of the FSIA's exceptions applies will a U.S. court have subject-matter jurisdiction and the authority to render a decision in the matter involving the foreign sovereign.[64]

3. Case Law Interpreting the FSIA

In *Verlinden B.V. v. Central Bank of Nigeria*, there was a contractual dispute between a foreign sovereign and a foreign corporation.[65] The parties executed the contract in 1975, prior to the FSIA's effective date.[66] The corporation filed suit against the foreign sovereign and alleged that the U.S. court had jurisdiction pursuant to the FSIA.[67] Ultimately, the Court addressed whether the FSIA's authorization of a foreign plaintiff's suit against a foreign sovereign in a U.S. court regarding a non-federal cause of action violated the U.S. Constitution.[68] The Court held that the FSIA was constitutional because a cause of action against a foreign sovereign "arises under" federal law. The Court explained that the Court must determine whether it has subject-matter jurisdiction by applying federal law to determine if an FSIA exception applies.[69] The Court also

58. *See id.*

59. 28 U.S.C. § 1604 (2012) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

60. 28 U.S.C. §§ 1605, 1607 (2012).

61. *Id.* § 1605(a)(3).

62. *Id.*

63. *Altmann*, 541 U.S. at 691.

64. *Id.* (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493–94 (1983)).

65. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 482 (1983).

66. *See id.*

67. *Id.* at 483.

68. *Id.* at 482. Article III of the U.S. Constitution indicates the allowable jurisdiction of the federal courts, and Congress is not authorized to expand the scope of federal court jurisdiction. *Id.* at 491. "Article III of the Constitution, we find two sources authorizing the grant of jurisdiction in the Foreign Sovereign Immunities Act: the diversity clause and the "arising under" clause." *Id.*

69. *Id.* at 493–94, 496–97.

explained that, even though the FSIA is labeled as a jurisdictional statute, the FSIA's jurisdictional provisions are only a part of the FSIA's "comprehensive scheme," and thus, the FSIA is constitutional.[70]

In *Dole Food Company v. Patrickson*, the Court addressed whether a foreign entity's "instrumentality" status under the FSIA should be determined as of the time the alleged wrongdoing occurred or as of the time the action was filed.[71] The Court held that the instrumentality status must be determined at the time the action commenced, regardless of the instrumentality status when the alleged conduct occurred, because the language in the FSIA was in present tense.[72] The Court affirmed the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'"[73]

Therefore, the constitutionality of the FSIA was tested and the Court held that it was constitutional.[74] Furthermore, for the purposes of the FSIA's expropriation exception, whether a state-owned entity is deemed an "instrumentality" of the foreign sovereign depends on the relationship of the foreign sovereign and the entity at the time the cause of action commenced.[75]

B. *Case Law Interpreting the Presumption Against Retroactivity*

The FSIA was enacted in 1976, more than thirty years after the victims of the Nazis had their lives, loved ones, possessions, and their art taken from them. Therefore, claimants who sought to recover their Nazi-expropriated art from a foreign sovereign or its instrumentality would need to establish that the FSIA applied retroactively to expropriations that occurred during World War II. U.S. courts have applied a general presumption against the retroactive application of a law; however, the presumption does not always control.

In *Landgraf v. USI Film Prods.*, the Court articulated the default rule regarding the presumption against retroactivity: unless Congress intended or expressed otherwise, the presumption against retroactivity governs federal statutes that have a retroactive effect.[76] A statute has a retroactive effect if it "impair[s] vested rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties

70. *Id.* at 496–97.

71. Dole Food Co. v. Patrickson, 538 U.S. 468, 471 (2003).

72. *Id.* at 478.

73. *Id.* "[T]he [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit." *Id.* (quoting Anderson v. Watt, 138 U.S. 694, 702–03 (1891)).

74. *Verlinden*, 461 U.S. at 496–97.

75. *Dole Food Co.*, 538 U.S. at 478.

76. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

with respect to transactions already completed."[77] In *Landgraf*, the Court addressed whether the 1991 amendment to the Civil Rights Act (1991 Amendment) applied retroactively to pre-amendment conduct.[78] Despite Congress's deliberate deletion of language regarding the amendment's retroactivity in prior versions of the amendment, the Court concluded that Congress had not manifested an intent that the 1991 Amendment apply to pre-amendment conduct.[79] Next, the Court concluded that the 1991 Amendment had a retroactive effect because it authorized "punitive" or "exemplary" damages,[80] and compensatory damages, which impacted "private parties' planning."[81] The 1991 Amendment created a new cause of action, a new right to monetary relief, and a "new disability" on liable employers.[82] Therefore, the 1991 Amendment was subject to the presumption against retroactivity and did not apply to conduct that occurred prior to the 1991 Amendment.[83]

In *Landgraf*, the Court discussed the constitutional concerns that support the presumption against retroactive application of statutes.[84] The Court stressed the constitutional significance of protecting the rights of "citizens"[85] and "individuals"[86] "to fair notice, reasonable reliance, and settled expectations."[87] The Court stated that, unless Congress indicates otherwise, no law shall apply retroactively to "statutes burdening private rights";[88] to statutes "affecting contractual or property rights";[89] or to statutes that negatively affect vested rights.[90]

Despite the constitutional concerns inherent in the retroactive application of most statutes, in *Landgraf* the Court indicated that the presumption against retroactivity regularly does not apply to statutes that give or take away jurisdiction because jurisdictional statutes do not give

77. *Id.*
78. *Id.* at 249–50.
79. *Id.* at 255–56.
80. *Id.* at 281.
81. *Id.* at 282.
82. *Id.* at 283. *But see id.* at 297 (Blackmun, J., dissenting). In Justice Blackmun's dissenting opinion he argued that the presumption against retroactivity should not have applied because the defending company did not have a vested right to allow sexual harassment; therefore, the 1991 Amendment did not affect the company's vested rights. *Id.* "[T]here is no such thing as a vested right to do wrong." *Id.*
83. *Id.* at 283 (majority opinion).
84. *Id.* at 265–67, 270.
85. *Id.* at 265 n.18.
86. *Id.* at 265.
87. *Id.* at 270.
88. *Id.*
89. *Id.* at 271.
90. *Id.* at 272.

or take away substantive rights.[91] Unlike a statute that affects substantive vested rights, jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties."[92] Regardless of when the alleged wrongful conduct occurred, jurisdictional statutes in effect at the time an action commences govern the action's jurisdictional analysis.[93]

In *Hughes Aircraft Co. v. United States, ex rel. Schumer*, Schumer sued Hughes pursuant to the False Claims Act's (FCA) *qui tam* provision.[94] Schumer alleged that Hughes submitted the allegedly false claims to the government in 1982 and 1984.[95] In 1986, an amendment was made to the FCA that, if the amendment applied to Hughes's pre-amendment conduct, would preclude Schumer from suing Hughes.[96] The Court concluded that (1) Congress did not manifest an intent that the FCA amendment apply to pre-amendment conduct[97] and (2) the FCA amendment had a retroactive effect.[98] The FCA amendment had a retroactive effect because it substantively changed the cause of action by eliminating a defense.[99] The Court further reasoned that the FCA amendment had a retroactive effect because the amendment was not merely jurisdictional, but rather it created jurisdiction where none existed before.[100] Therefore, the Court held that the presumption against retroactivity precluded the FCA amendment from applying to the pre-amendment conduct.[101]

Accordingly, the presumption against retroactivity applies to statutes that have a retroactive effect, such as adding or removing a substantive private right. However, the presumption does not apply if Congress intends that the law apply retroactively or if the law merely gives or takes away jurisdiction. Whether the presumption against retroactivity applied to the FSIA was ultimately decided in *Republic of Austria v. Altmann*.[102]

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91. *Id.* at 274.
92. *Id.*
93. *See id.*
94. Hughes Aircraft Co. v. United States, *ex rel.* Schumer, 520 U.S. 939, 943 (1997).
95. *Id.* at 945.
96. *Id.* at 951–52.
97. *Id.* at 946.
98. *Id.* at 947.
99. *Id.* at 948. In *Hughes*, the Court explained that "[a] law that abolishes an affirmative defense violates the *Ex Post Facto* Clause" and has an impermissible retroactive effect; therefore, the presumption against retroactivity must apply. *Id.* (quoting Collins v. Youngblood, 497 U.S. 37, 49 (1990)).
100. *Id.* at 951.
101. *Id.* at 951–52.
102. *See* Republic of Austria v. Altmann, 541 U.S. 677, 694–96 (2004).

C. *Republic of* Austria v. Altmann

In *Republic of Austria v. Altmann*, the U.S. Supreme Court analyzed the precedent described in Parts II.A and II.B, and held that the FSIA applied retroactively to the Nazis' expropriations of Jewish-owned art.[103] The claimant, Marie Altmann, was born in Austria in 1916 and remained there until shortly after the Nazi annexation of Austria in 1938.[104] Before the rise of Nazi Germany, Altmann's uncle, Ferdinand Bloch-Bauer, who also resided in Austria, commissioned multiple paintings from a renowned Austrian artist, Gustav Klimt.[105] These paintings included the *Portrait of Adele Bloch-Bauer*, an iconic painting that Austrians now regard as their *Mona Lisa*.[106] Adele died in 1925, leaving a will that asked Ferdinand to give the paintings to the Austrian Gallery after his death.[107] Ferdinand fled Austria before it was annexed, and subsequently, a Nazi agent seized and later sold Ferdinand's paintings, some of which were acquired by the Austrian Gallery.[108] In 1945, Ferdinand died, leaving his estate to Altmann as well as other beneficiaries.[109] At the time that Altmann filed her art restitution action in a U.S. court, she was Ferdinand's sole surviving beneficiary.[110]

After the war, Altmann (a U.S. citizen as of 1945) and her family attempted to recover the Klimt paintings from the Austrian Gallery, but to no avail.[111] The Gallery insisted that Adele and Ferdinand donated the Klimt paintings to the Gallery.[112] However, in 1998, a journalist discovered that the Gallery knew that the paintings were actually seized by a Nazi agent and that the provision in Adele's will was merely a non-binding request.[113] In response to the journalist's findings and the resulting public outcry, Austria passed a law allowing victims of Nazi expropriation to reclaim property that had been wrongfully taken by the Nazis.[114] That provision gave a committee of Austrian officials the authority to determine whether Austria would return the art to its rightful owner.[115] Altmann tried to take advantage of the new law, but the

103. *See id.* at 697; *supra* Parts II.A–B.
104. *Altmann*, 541 U.S. at 681.
105. *Id.* at 680–81.
106. O'CONNOR, *supra* note 1, at xiii.
107. *Altmann*, 541 U.S. at 681–82.
108. *Id.* at 682.
109. *Id.* at 681.
110. *Id.*
111. *Id.* at 681, 683.
112. *Id.* at 683.
113. *Id.* at 684.
114. *Id.*
115. *See id.*

committee refused to return the paintings to her. The committee insisted that the Gallery was the rightful owner of the paintings under the terms of Adele's will.[116]

Subsequently, Altmann sued the Republic of Austria and the Austrian Gallery, an instrumentality of Austria (hereinafter referred to collectively as the "Gallery").[117] Altmann's complaint alleged that she was the rightful owner of the Klimt paintings and that the FSIA gave the court subject-matter jurisdiction over the Gallery.[118] Altmann argued that the FSIA's expropriation exemption precluded the Gallery from claiming foreign sovereign immunity.[119] In response, the Gallery argued that it had absolute immunity from the jurisdiction of U.S. courts because the FSIA did not exist at the time of the alleged Nazi expropriation of the Klimt paintings and the FSIA did not retroactively deprive the Gallery of immunity.[120]

The U.S. district court rejected the Gallery's arguments and held that the FSIA applied to pre-FSIA conduct and that the expropriation exception applied to Altmann's claims; therefore, the Gallery could not invoke foreign sovereign immunity.[121] The U.S. Circuit Court of Appeals for the Ninth Circuit affirmed.[122] Subsequently, the U.S. Supreme Court granted the Gallery's petition for writ of certiorari.[123] The Court affirmed the Ninth Circuit's decision.[124]

The Court addressed only whether the FSIA applied to conduct that occurred prior to the FSIA's enactment,[125] but did not address the merits or justiciability of Altmann's claims or the Gallery's defenses.[126] The Court applied the default rule in *Landgraf* regarding the presumption against retroactivity and found that it was not dispositive.[127] The Court first considered whether Congress expressly stated or manifested an intent that the FSIA apply to pre-FSIA conduct.[128] The Court noted that the FSIA's preamble suggested, but did not expressly state, that the FSIA applied to pre-FSIA conduct.[129] Later in the Court's opinion, the Court

116. *Id.*
117. *Id.* at 681–84.
118. *Id.* at 685.
119. *Id.* at 685–86.
120. *Id.* at 681, 686.
121. *Id.* at 686–87.
122. *Id.* at 687 n.8.
123. *Id.* at 688.
124. *Id.*
125. *Id.* at 681.
126. *See id.* at 692, 700–02.
127. *Id.* at 692.
128. *Id.* at 694.
129. *Id.*

indicated that it found "clear evidence" in the preamble that the legislature intended the FSIA to apply to pre-enactment conduct.[130]

However, since the FSIA did not contain an express command regarding whether the FSIA applied to pre-enactment conduct, the Court considered whether the FSIA had a retroactive effect.[131] The Court concluded that the FSIA did not affect any substantive rights because a claim of sovereign immunity under the FSIA is merely a jurisdictional defense.[132] Furthermore, the FSIA did not increase liability for past conduct or impose new duties on the parties.[133] The Court also explained that the presumption against retroactivity was to avoid *post hoc* changes to rules that the parties relied on.[134] The purpose of the FSIA was never to allow foreign sovereigns to rely on a promise of future immunity and to shape their conduct accordingly.[135] Since the FSIA had no retroactive effect, the default rule in *Landgraf* regarding the presumption against retroactivity did not preclude the FSIA from applying to pre-FSIA conduct.[136]

Since the presumption against retroactivity did not apply to the FSIA, the Court considered whether there were any other factors that would bar the FSIA's application to pre-enactment conduct.[137] The Court acknowledged its long-standing custom of deferring to the decisions of the political branches regarding foreign sovereign immunity determinations and noted that the FSIA was the most recent decision of a political branch regarding foreign sovereign immunity.[138] The Court explained that neither the FSIA nor the circumstances surrounding the FSIA's enactment suggested that the FSIA should not apply to pre-enactment conduct[139] and that a retroactive application of the FSIA was consistent with the purpose of the FSIA.[140] Accordingly, the Court concluded that it should continue to defer to the now-in-effect decision of a political branch regarding foreign sovereign immunity, *i.e.*, the FSIA, regardless of when the cause of action's underlying conduct occurred.[141] Notably, the Court declined to review, and thus left undisturbed, the appellate court's conclusion that the expropriation exception applied to

130. *Id.* at 697.
131. *Id.* at 694; *see* Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
132. *Altmann*, 541 U.S. at 700.
133. *Id.* at 695.
134. *Id.* at 696.
135. *Id.*
136. *Id.* at 694–96.
137. *Id.* at 697.
138. *Id.* at 696.
139. *Id.* at 697.
140. *Id.* at 699.
141. *Id.* at 696, 700.

Altmann's claims against the Gallery.[142] Accordingly, U.S. courts had subject-matter jurisdiction over the Gallery because the Gallery's pre-FSIA conduct fit within the FSIA's expropriation exception, depriving the Gallery of foreign sovereign immunity. Altmann's claims passed jurisdictional muster.

Despite Altmann's success at the U.S. Supreme Court, the prospect of lengthy and costly litigation on the merits of Altmann's claim was daunting, particularly because, at the time, Altmann was approaching her 90th birthday.[143] Therefore, Altmann and the Gallery agreed to submit to binding arbitration in Austria.[144] After months of deliberation, the three arbiters unanimously agreed that Altmann was entitled to recover the Klimt paintings.[145] Although Altmann's art restitution claims were ultimately resolved outside the U.S. judicial system, the Court's decision in *Altmann* profoundly affected art restitution law. The Court addressed only the narrow issue of whether the FSIA applied to conduct that occurred prior to its enactment; however, the *Altmann* decision opened the doors of U.S. courts to claims brought by long-suffering victims of Nazi expropriation against foreign sovereigns who refuse to relinquish possession of the expropriated art.

D. *Altmann's Progeny and the Expanding Scope of the FSIA's Expropriation Exception*

Since *Altmann*, U.S. courts have further developed and extended the scope of the FSIA's jurisdictional grant. *Altmann* made claims against foreign sovereigns for the recovery of Nazi-expropriated art possible in U.S. courts by broadening the temporal scope of permissible claims to those that arose out of pre-FSIA conduct.[146] Without *Altmann*, the courts in *Cassirer v. Kingdom of Spain* and *Simon v. Republic of Hungary*, and many others, could not have reached the conclusions that they did.[147] Like in *Altmann*, the claims in *Cassirer* and *Simon* arose out of the Nazi's wrongful expropriation of property.[148] In *Cassirer*, the court broadened the potential defendants that could be hailed into U.S. courts under the FSIA's expropriation exception to include foreign sovereigns that were not involved in the original expropriation, had no knowledge of the

142. *Id.* at 686–87, 687 n.8.

143. *See* E. Randol Schoenberg, *The Recovery from Austria of Five Paintings by Gustav Klimt*, 9 IFAR J. 28, 40 (2006).

144. *Id.*

145. *Id.*

146. *Altmann*, 541 U.S. at 685–88.

147. *Id.*; Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1037 (9th Cir. 2010) (en banc); Simon v. Republic of Hungary, 812 F.3d 127, 142–43 (D.C. Cir. 2016).

148. *Altmann*, 541 U.S. at 680–81; *Cassirer*, 616 F.3d at 1022; *Simon*, 812 F.3d at 132.

expropriation or the art's provenance, and had acquired the property in good faith.[149] Significantly, Spain (the party that possessed the art at the time of the action) was not immune even though it had *not itself taken* the painting in violation of international law.[150] In *Simon*, the court further broadened the scope of the FSIA's expropriation exception by concluding that genocidal takings violated international law under the FSIA's expropriation exception.[151] Although the FSIA, the Court's opinion in *Altmann*, and *Altmann*'s progeny enabled art-restitution claimants to obtain subject-matter jurisdiction over foreign sovereigns,[152] other procedural obstacles continued to block many claimants from recovering their Nazi-expropriated art, namely the statutes of limitations under state law.[153]

E. *The Remaining Obstacle to Reaching the Merits: States' Statutes of Limitations*

Generally, statutes of limitations are areas of state law concern.[154] "The purpose of a statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs.'"[155] In most states, the statute of limitations for the recovery of personal property ranges from two to six years.[156] However, some states have altered the statute of limitations for certain types of personal property, such as art, since it may be easy to conceal.[157] Rather than extend the duration of a statute of limitations, states have changed when the statutory time period begins to run (*i.e.*, when the cause of action accrues).[158] States that have altered the rules for their statute of limitations in this manner generally adhere to one of three ways of determining when the cause of action accrued and whether the statute of

149. *Cassirer*, 616 F.3d at 1031–32.

150. *Id.* at 1037. In fact, *Cassirer* pushed the scope of the FSIA's expropriation exception further than *Altmann* even contemplated. During the *Altmann* oral argument before the U.S. Supreme Court, the Gallery's counsel stated definitively that the mere possession of expropriated property did not fit within the FSIA's expropriation exception. Transcript of Oral Argument at 6–7, Republic of Austria v. Altmann, 541 U.S. 677 (2004).

151. *Simon*, 812 F.3d at 142–46.

152. *See supra* Parts II.A–D.

153. *See, e.g.*, Orkin v. Taylor, 487 F.3d 734, 741–42 (9th Cir. 2007).

154. *See generally* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429–30 (N.Y. 1991).

155. O'Keeffe v. Snyder, 416 A.2d 862, 868 (N.J. 1980) (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

156. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 287 (7th Cir. 1990); *O'Keeffe*, 416 A.2d at 865; Lerner, *supra* note 48, at 16.

157. *See O'Keeffe*, 416 A.2d at 868–69, 871.

158. *See id.* at 869; Lerner, *supra* note 48, at 18–20.

limitations bars the claim.

First, the "Discovery and Due Diligence Rule" has been applied in New Jersey, Indiana, and California (relating to property stolen prior to 1983), among other states.[159] Under this rule, the statute of limitations time period will not begin to run until the injured party discovers, or with due diligence should have discovered, facts which would form the basis of a cause of action to recover the personal property, including the identity of the possessor.[160] A claimant may have reasonably been able to discover the facts necessary to state a claim if, among other things, the artwork had been sold at a public auction, especially if the auction was highly publicized, if the name of the purchaser of the artwork was stated in a publicly-available *catalogue raisonné*,[161] or if the artwork was registered as stolen through an organization that provides a publicly-available registry of stolen artworks.[162] The U.S. Circuit Court of Appeals for the Seventh Circuit has held that a claimant (whose Byzantine mosaics were looted) exercised sufficient due diligence by contacting various international organizations, journalists, collectors, museums, experts, and scholars who would likely help the claimant recover the mosaics.[163] Furthermore, whether the claimant exercised due diligence depends on the doctrine of fraudulent concealment.[164] A possessor of artwork who has fraudulently prevented a potential claimant from discovering the facts necessary to establish "a cause of action cannot take advantage of his wrongdoing by raising the statute of limitations" defense.[165] Ultimately, whether a claimant has exercised sufficient due diligence for the purposes of the Discovery and Due Diligence Rule is a fact-intensive inquiry that must be decided on a case-by-case basis.[166]

A second type of statute of limitations rule, the "Actual Discovery Rule," has been applied in California since 1983 to actions brought against a museum, gallery, auctioneer, or dealer for an unlawful taking of fine art.[167] Under the Actual Discovery Rule, the statute of limitations

159. *See Autocephalous Greek-Orthodox of Cyprus*, 917 F.2d at 288; Orkin v. Taylor, 487 F.3d 734, 741–42 (9th Cir. 2007); *O'Keeffe*, 416 A.2d at 870.

160. *O'Keeffe*, 416 A.2d at 869.

161. *Orkin*, 487 F.3d at 741–42.

162. *See O'Keeffe*, 416 A.2d at 866, 870.

163. *Autocephalous Greek-Orthodox of Cyprus*, 917 F.2d at 281, 290.

164. *Id.* at 288.

165. *Id.* However, if the claimant was not "reasonably diligent in discovering the fraud," the statute of limitations will begin to run at the time that the claimant reasonably should have discovered the fraud. *Id.* (citing to Guy v. Schuldt, 138 N.E.2d 891, 896 (1956)).

166. *Id.* at 289.

167. CAL. CIV. PROC. CODE § 338(c)(3) (West 2016) (defining fine art as "any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art . . . crafts . . . or mixed media"); CAL. CIV. CODE § 982(d)(1)

time period will not begin to run until the claimant discovers the identity of the possessor of the stolen property, without regard to claimant's exercise of due diligence (or lack thereof) in searching for the stolen property.[168] Additionally, "actual discovery" includes the discovery of the whereabouts of the unlawfully-taken artwork and the discovery that the claimant has a possessory interest in the artwork.[169] Actual discovery "does not include constructive knowledge imputed by law."[170] The Actual Discovery Rule lessens the burden on the claimant by eliminating the due diligence requirement; however, the claimant must still establish when certain information was discovered in order to determine when the statute of limitations began to run, which may be a fact-intensive inquiry and difficult to prove.

A third type of statute of limitations rule is the "Demand and Refusal Rule." A New York court first applied the Demand and Refusal Rule in *Menzel v. List* where the claimant was suing a New York art collector to recover a painting that was stolen during World War II.[171] The Demand and Refusal Rule states that the statute of limitations time period begins to run when the defendant refuses to convey the personal property upon the claimant's demand, and not when the actual theft or taking occurred.[172] The statute of limitations will only begin to run when the party in possession of the art has absolutely and unconditionally refused to return the art to its rightful owner.[173] This rule was applied in *De Csepel v. Hungary*, where the state's statute of limitations did not bar the art-restitution claim because the claimant had filed his complaint *after* Hungary refused to return the art but *before* the statute of limitations time period had expired.[174] The Demand and Refusal Rule grants the most protection to the rightful owners of stolen property because it clearly indicates when the statute of limitations begins to run without a fact-intensive inquiry regarding when the claimant discovered certain information, it provides more time for the claimant to receive notice of the artwork's whereabouts, and it relieves the injured party from having to prove that its search for the artwork was reasonably diligent.[175]

The different accrual rules that states apply to their statutes of

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(West 2016); Orkin v. Taylor, 487 F.3d 734, 741 (9th Cir. 2007).

168. *See* Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 788, 792 (Cal. Ct. App. 1996).

169. CAL. CIV. PROC. CODE § 338(c)(3)(A).

170. *Id.* § 338(c)(3)(C)(i).

171. Menzel v. List, 267 N.Y.S.2d 804 (N.Y. Gen. Term 1966); Lerner, *supra* note 48, at 20.

172. *Menzel*, 267 N.Y.S.2d at 809.

173. De Csepel v. Hungary, 714 F.3d 591, 603 (D.C. Cir. 2013).

174. *Id.* at 604.

175. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430–31 (N.Y. 1991).

limitations often result in widely different outcomes for claimants seeking to recover their Nazi-expropriated art.[176] For example, in some states, such as a state that applies the claimant-friendly Demand and Refusal Rule, the statute of limitations may not prevent a court from reaching the merits of the claim.[177] However, under the same facts but applying a different state's accrual rule, such as a state that applies one of the discovery-related rules, the claimants entire claim may be time-barred, resulting in no relief for the long-suffering victims of Nazi expropriation.[178] Despite the adoption of accrual rules, the statute of limitations in most states has effectively barred claimants from recovering their Nazi-expropriated art.[179] One state sought to remedy the effect of its statute of limitations by enacting a law that extended the statute of limitations for matters relating to the restitution of Nazi-expropriated art.[180] However, the law was declared unconstitutional because it impinged on the federal government's exclusive authority over foreign affairs and war-related claims.[181] Therefore, to give teeth to its numerous declarations of support to victims of Nazi expropriation and for art restitution efforts, Congress passed the HEAR Act as "the latest step" in its effort "to help restore artwork and other cultural property to its rightful owners."[182] Since states cannot make exceptions to their own statutes of limitations to accommodate the unique circumstances surrounding the recovery of Nazi-expropriated art, Congress alone had the authority to correct this injustice.

176. *See* O'Keeffe v. Snyder, 416 A.2d 862, 868 (N.J. 1980) (indicating that if the Demand and Refusal Rule applied, then the statute of limitations would not have expired and the claimant could have recovered her stolen artwork; however, since the court concluded that the Discovery and Due Diligence Rule applied, more fact-finding regarding the claimant's diligence was needed in order to determine whether the statute of limitations had expired).

177. *See id.*

178. *See id.*

179. S. REP. NO. 114-394, at 5 (2016).

180. Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 957 (9th Cir. 2009).

181. *Id.* at 965–68.

182. S. REP. NO. 114-394, at 2–5.

PART III – THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

A. *Introduction to the HEAR Act*

1. The HEAR Act's Journey Through the U.S. Legislature

The HEAR Act was introduced in the U.S. Senate on April 7, 2016.[183] It was originally sponsored by Senator John Cornyn (R-TX), Senator Ted Cruz (R-TX), Senator Charles Schumer (D-NY), and Senator Richard Blumenthal (D-CT).[184] Since its introduction, numerous co-sponsors added their support for the HEAR Act and it enjoyed considerable bi-partisan support.[185]

On June 7, 2016, the Senate Judiciary Subcommittee on Constitution, Civil Rights and Human Rights along with the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts held a joint hearing on the HEAR Act.[186] The hearing was a somber event that involved lengthy statements from Senators and testimony from witnesses regarding the significance of and dire need for the passage of the HEAR Act.[187] The witnesses and Senators acknowledged the renewed public interest in the plight of Nazi-expropriation victims that followed the release of *Women in Gold*, a film that illustrated Marie Altmann's struggle to recover her family's Klimt paintings from the Gallery.[188] During the hearing, the Senators stated that their goal was to provide justice for victims of Nazi expropriation and to stop arbitrary time-based bars from preventing art restitution claims from reaching the merits of the claim.[189] The Senators indicated that the HEAR Act could achieve this goal because it sets a federal statute of limitations (preempting statutes of limitations under state law) that is only triggered when the claimant has actual knowledge of the identity and location of the expropriated property and knowledge of their possessory interest in the property.[190] The witnesses, who have expert knowledge or personal

183. All Bill Information for Holocaust Expropriated Art Recovery Act of 2016, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2763/all-info?result Index=1#major-actions (last visited Dec. 20, 2016).

184. *Id.*

185. *Id.*

186. *Id.*

187. *See generally id.*

188. *Holocaust Expropriated Art Recovery Act – Reuniting Victims with their Lost Heritage: Hearing on S. 2763 Before the Subcomm. on the Constitution & the Subcomm. on Oversight, Agency Action, Fed. Rights, and Fed. Courts*, 114th Cong. (2016).

189. *See id.*

190. *See id.*

experience on the topic of art restitution, testified regarding the many challenges facing claimants who seek to recover their Nazi-expropriated art, including the legal challenges that statutes of limitations under state law have caused, along with other logistical and evidentiary challenges.[191]

A few months following the hearing, the Judiciary Committee reported an amendment to the HEAR Act in the nature of a substitute.[192] A related bill was introduced in the U.S. House of Representatives on October 11, 2016 and referred to the Subcommittee on the Constitution and Civil Justice.[193] In early December 2016, the HEAR Act passed in the U.S. House of Representatives and in the U.S. Senate. On December 16, 2016, the HEAR Act was signed by former President Barack Obama and became a law.[194]

2. The Purpose and Findings of the HEAR Act

The HEAR Act states that the purpose of the law is to harmonize federal law with the policies set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.[195] The HEAR Act's second purpose is to ensure that art restitution claims regarding Nazi-expropriated art "are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."[196]

The HEAR Act makes numerous findings that support its passage. First, the HEAR Act acknowledges that the Nazis misappropriated thousands of pieces of art and other property "throughout Europe as part of their genocidal campaign against the Jewish people."[197] The HEAR Act also restates the oft-quoted statement that the Nazis' conduct constituted the "greatest displacement of art in human history."[198] Next,

191. *See id.*; Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(6), 130 Stat. 1524.

192. All Bill Information for Holocaust Expropriated Art Recovery Act of 2016, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2763/all-info?result Index=1#major-actions (last visited Dec. 20, 2016).

193. *Id.*

194. All Bill Information for Holocaust Expropriated Art Recovery Act of 2016, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/6130/actions (last visited Feb. 12, 2017).

195. Holocaust Expropriated Art Recovery Act of 2016 § 3(1); *see supra* Part I.

196. Holocaust Expropriated Art Recovery Act of 2016 § 3(2).

197. *Id.* § 2(1).

198. *Id.*; Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 957 (9th Cir. 2010) (quoting MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 202 (N.Y.U. Press 2003)). "During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has

the HEAR Act makes several findings regarding the United States and the international community's efforts to return the expropriated art to their home countries and rightful owners, such efforts include the Washington Conference, the Holocaust Victims Redress Act, and the Holocaust Era Assets Conference (which issued the Terezin Declaration).[199] Congress's findings also state that victims of Nazi expropriation, and more recently the victims' heirs, have tried to recover Nazi-expropriated art through the U.S. courts; however, these claimants have faced "significant procedural obstacles partly due to State statutes of limitations."[200] The HEAR Act describes how states' statutes of limitations typically employ the Discovery and Due Diligence Rule which imposes time constraints that are "especially burdensome" to claimants in light of the "unique and horrific circumstances of World War II and the Holocaust."[201] Congress explains that, since the states lacked the authority to make an exception for Nazi-expropriation victims in their statutes of limitations, federal legislation was needed to correct the unfair burden the statutes of limitations placed on these victims.[202]

3. The HEAR Act's Substantive Provisions

The HEAR Act created a blanket statute of limitations applicable to claims for the recovery of Nazi-expropriated art, regardless of any other provisions in state or federal law to the contrary.[203] Under the HEAR Act, the statute of limitations is six years and it accrues, or begins to run, when the claimant has "actual[ly] discover[ed]" each of the following: (1) the identity of the artwork; (2) the location of the artwork; and (3) that the claimant has a "possessory interest" in the artwork (the foregoing three elements are hereinafter referred to collectively as the "Requisite Information").[204] Six years after the actual discovery of the Requisite Information, the claimant will be time-barred from filing a claim to recover the Nazi-expropriated art in U.S. courts.[205] Under the HEAR Act, "actual discovery" means that the claimant has actual knowledge of the Requisite Information.[206]

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been termed the 'greatest displacement of art in human history.'" MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 202 (N.Y.U. Press 2003).

199. Holocaust Expropriated Art Recovery Act of 2016 § 2(2)–(5).

200. *Id.* § 2(6).

201. *See id.*; *supra* Part II.E.

202. Holocaust Expropriated Art Recovery Act of 2016 § 2(7).

203. *Id.* § 5(a).

204. *Id.*

205. *Id.*

206. *See id.* § 4(1), (4).

The HEAR Act provides special rules for pre-existing claims.[207] It states that a pre-existing claim is deemed "actually discovered" on the date of the HEAR Act's enactment if: (1) before enactment, the claimant had actual knowledge of the Requisite Information and the claim was barred by a federal or state statute of limitations; or (2) before enactment, the claimant had actual knowledge of the Requisite Information and the claim was *not* barred by a federal or state statute of limitations.[208] Therefore, with certain exceptions, if the claimant had the Requisite Information on or before the date of the HEAR Act's enactment, the statute of limitations begins to run on the date of enactment.[209]

The HEAR Act applies to claims that are pending on the date of its enactment, including claims pending on appeal, and to claims filed after the date of enactment, so long as the claims are filed before or pending when the HEAR Act sunsets on December 31, 2026.[210] For claims that are filed on or after January 1, 2027, claimants will be bound by applicable state and federal statutes of limitations.[211]

B. *Analysis of the HEAR Act*

1. "Actual Discovery" and the Sufficiency of the Actual Discovery Rule

Since the HEAR Act's definition of "actual discovery" requires "actual knowledge" of the Requisite Information, the HEAR Act likely prevents a defendant from arguing that a claim is time-barred merely because the claimant had constructive knowledge of the Requisite Information more than six years before the claim was filed.[212] Senate Report 394 supports the proposition that constructive knowledge is insufficient because it states that the intent of the "actual discovery" requirement is "to require more than access to the information . . . . [t]he party must have the knowledge itself or have sufficient information to constitute actual knowledge."[213] Additionally, the definitions of "actual discovery" and "knowledge" are silent about the claimant's diligence, which suggests that there is no requirement that the claimant exercise due diligence in acquiring the Requisite Information.[214] Therefore, a

207. *Id.* § 5(c).

208. *Id.*

209. *Id.* There are exceptions to the pre-existing claim rules. *See id.* § 5(e).

210. *Id.* § 5(g).

211. *Id.*

212. *See id.* § 4(1), (4); *e.g.*, CAL. CIV. PROC. CODE § 338(c)(3)(C)(i) (West 2016).

213. *See* S. REP. NO. 114-394, at 8–9 (2016).

214. *See* Holocaust Expropriated Art Recovery Act of 2016 § 4(1), (4); Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 786 (Cal. Ct. App. 1996) (holding that due diligence was not required under the discovery rule of accrual). *But see* Orkin v. Taylor, 487 F.3d 734, 741

claimant, even one who has constructive knowledge of the Requisite Information for more than six years or who has not diligently tried to discover the Requisite Information, may file a claim in U.S. courts, so long as "actual discovery" of the Requisite Information occurred within the six years prior to filing the claim.[215]

The HEAR Act's "actual discovery" requirement mirrors the Actual Discovery Rule applied in California since 1983, which, because it eliminates the diligence requirement, is far more generous to claimants than the Discovery and Due Diligence Rule.[216] Under the Discovery and Due Diligence Rule, a claim must be dismissed if the fact-finder determines that the claimant did not exercise a sufficient level of diligence in acquiring the Requisite Information.[217] Since art restitution claimants face numerous procedural and evidentiary challenges in bringing their claims in U.S. courts,[218] Congress properly chose to utilize the Actual Discovery Rule in the HEAR Act rather than the Discovery and Due Diligence Rule. Between these two rules, the Actual Discovery Rule is less burdensome on the claimant because it does not have a diligence requirement. However, Congress would have better fulfilled its objective of freeing Nazi-expropriation victims from time-based limits on their claims by adopting the Demand and Refusal Rule.

2. Congress Should Have Adopted the Most Claimant-Friendly Accrual Rule: The Demand and Refusal Rule

Considering the egregious conduct that led to the widespread expropriation of artworks by the Nazis, the difficulties and defeat that claimants have experienced in U.S. courts, and the express purpose of the HEAR Act to remove unfair procedural obstacles so that art restitution claims could be decided on their merits, Congress should have incorporated in the HEAR Act a statute of limitations accrual rule that was as broad and claimant-friendly as possible. Congress will fulfill its objectives more fully if it amends the HEAR Act to incorporate the Demand and Refusal Rule. This rule is more claimant-friendly than the discovery-related rules because it does not require a claimant to prove when the Requisite Information was actually discovered or that the claimant was reasonably diligent in discovering the Requisite

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(9th Cir. 2007) (holding that due diligence is required under the discovery rule of accrual).

215. *See* Holocaust Expropriated Art Recovery Act of 2016 §§ 4, 5; S. REP. NO. 114-394, at 8–9.

216. *See* Holocaust Expropriated Art Recovery Act of 2016 §§ 4, 5; Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430–31 (N.Y. 1991); *supra* Part II.E.

217. *See supra* Part II.E.

218. *See Lubell*, 569 N.E.2d at 430–31; S. REP. NO. 114-394, at 5.

Information.[219] Instead of an "actual discovery" standard, the HEAR Act should require the following in order for the statute of limitations to accrue: (1) a written demand for the artwork sent by the claimant to the current possessor of the artwork, and (2) a refusal by the current possessor, either express or implied, to return the artwork. The HEAR Act should indicate that a refusal is implied if the current possessor received the claimant's written demand, but fails to respond to the demand within a certain period of time. A provision regarding implied refusal prevents a current possessor from refusing to respond to the demand indefinitely, which would delay the claimant's ability to recover the artwork or to resolve the claim. The Demand and Refusal Rule would effectively give claimants more time to locate the artwork and to ensure that they acquired accurate Requisite Information, give more time for the current possessor to be on notice of the claimant's ownership claim,[220] and give more time for the parties to communicate regarding the artwork. Furthermore, these benefits of the Demand and Refusal Rule may better enable the claimant and the current possessor to reach a private resolution outside of U.S. courts entirely.

The application of the Demand and Refusal Rule would serve a claimant-friendly evidentiary function. The rule relieves the claimant from having to prove when the Requisite Information was actually discovered. If the HEAR Act is amended to adopt the Demand and Refusal Rule, the claimant's written demand will be straightforward and effective evidence that, on the date of the written demand, the claimant had the Requisite Information and that, shortly thereafter, the current

219. *See Lubell*, 596 N.E.2d at 430–31.

> While the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property. *Less protective measures* would include running the . . . statutory period from the time of the theft even where a good-faith purchaser is in possession of the stolen chattel, or, alternatively, calculating the statutory period from the time that the good-faith purchaser obtains possession of the chattel. Other States that have considered this issue have applied a discovery rule to these cases, with the Statute of Limitations running from the time that the owner discovered or reasonably should have discovered the whereabouts of the work of art that had been stolen."

Id. (emphasis added) (citations omitted).

220. *Id.* at 430 (explaining that the Governor of New York vetoed legislation that adopted the discovery rule because the bill did "not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights were extinguished" and because the legislation would make New York "a haven for cultural property stolen abroad such objects would be immune from recovery under the limited periods established by the bill").

possessor had knowledge of the claimant's claim. A claimant's written demand singularly proves that the Requisite Information has been discovered, without the added burden of having to prove *when* the Requisite Information was discovered. The Demand and Refusal Rule removes the laborious fact-finding process that may be involved in determining when the Requisite Information was discovered and replaces it with a determination of a simple fact: when the written demand was sent to the current possessor of the art. This rule is simple to apply; therefore, if it were incorporated into the HEAR Act, it would effectively limit any dispute regarding whether a claim is time-barred by the HEAR Act. The limited complexity of the Demand and Refusal Rule properly allows the claimant to focus his or her effort, time, and resources on litigating the merits of the claim rather than litigating the accrual of the statute of limitations.

Lastly, the HEAR Act may limit the rights of claimants who live in a state that has adopted a more claimant-friendly accrual rule (*e.g.*, the Demand and Refusal Rule) than the HEAR Act's Actual Discovery Rule. The HEAR Act applies to claims that are not yet barred by state or federal statutes of limitations.[221] According to Section 5(c) of the HEAR Act, a claim is deemed actually discovered on the date of enactment if, on or before its enactment, the claimant had actual knowledge of the Requisite Information.[222] Therefore, for pre-existing claims (*i.e.*, where claimants have already discovered the Requisite Information, but have not yet filed their claim in a U.S. court), the statute of limitations accrues on the date of the HEAR Act's enactment.[223] Since the HEAR Act preempts other federal and state statutes of limitations,[224] this treatment of pre-existing claims may restrict claimants who live in a state that applies a more generous accrual rule than the one provided in the HEAR Act, such as a state that applies the Demand and Refusal Rule. For claimants whose state statute of limitations follows the Demand and Refusal Rule, the HEAR Act will force the statute of limitations to accrue prior to when it would accrue under state law. Congress should amend the HEAR Act to apply the Demand and Refusal Rule so that claimants who live in a state that applies the Demand and Refusal Rule are not forced to apply the HEAR Act's accrual rule. Alternatively, Congress should amend the HEAR Act to allow a claimant to elect to invoke the state's statute of limitations and accrual rules if the state's rules are more beneficial to the claimant.

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221. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(c), 130 Stat. 1524.

222. *Id.*

223. *See id.*

224. *See id.* § 5(a).

Summarily, the HEAR Act will satisfy its purpose more fully if it is amended to incorporate the Demand and Refusal Rule. This rule provides the claimant with additional time before the statute of limitations will begin to run and it simplifies the fact-finding process for determining when the statute of limitations began to run. Additionally, the HEAR Act should be amended because it preempts state statutes of limitations, even state statutes of limitations that are more beneficial to the claimant. A claimant is bound by the HEAR Act's statute of limitations even if the claimant's state has adopted a more claimant-friendly accrual rule, such as the Demand and Refusal Rule.

CONCLUSION

Since World War II, victims of Nazi expropriation have repeatedly been denied justice at the hands of technical procedural rules relating to subject-matter jurisdiction and statutes of limitations under state law. The FSIA, the U.S. Supreme Court's decision in *Republic of Austria v. Altmann*, and now the HEAR Act, have each sought to remedy this injustice. Although the HEAR Act should be amended to adopt the Demand and Refusal Rule, in its current form it will likely enable many claims for the recovery of Nazi-expropriated art to reach the merits, which is laudable even if it is strikingly overdue. As Dame Helen Mirren said during her testimony at the Senate subcommittee hearing on the HEAR Act, "[g]reed, cruelty, self-interest, domination, will always be with us. It's an easy option. Justice is so much more difficult, so much more complex. But we all dream of justice." Congress's passage of the HEAR Act allows this long-held dream of justice to finally begin to become a reality for many long-suffering victims of Nazi expropriation.

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Editorial and Business Address: Fredric G. Levin College of Law, University of Florida, P.O. Box 117636, 351 Village Dr., 127 Holland Hall, Gainesville, FL 32611. Phone: (352) 273-0906. Email Address: jlpp@law.ufl.edu.

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